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No. 09-110 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HCA INC., BRIDGESTONE AMERICAS, INC. F/K/A BRIDGESTONE AMERICAS HOLDINGS, INC., HUNTSMAN CORPORATION, NECHES GULF MARINE, INC., AND HORNBECK OFFSHORE SERVICES, INC.,

Petitioners,

v.

AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., ALAN S. DANIEL AND WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF IN OPPOSITION FOR RESPONDENTS ALAN S. DANIEL AND WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED (PLAINTIFFS-RESPONDENTS)

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QUESTION PRESENTED

In the context of a nationwide opt-out class action settlement, did the court below err in holding that, when a state has a sufficient aggregation of contacts with the claims of the class members, that court may constitutionally apply the state's own substantive law in a manner that is neither unfair nor arbitrary?

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COUNTER-STATEMENT OF THE CASE

Petitioners' "Statement of the Case" is materially incomplete and inaccurate. The record in this action demonstrates that the decision below is a fact-specific application of firmly settled doctrine that presents no occasion for this Court's review.

A. The Class Claims and Their Procedural History

1. In August 1999, plaintiff Alan Daniel commenced this class action in the Circuit Court of Cook County, Illinois, Chancery Division (the "circuit court"), against defendant Aon Corporation and certain of its subsidiaries. Mr. Daniel brought the action on behalf of himself and a class of persons who obtained insurance through Aon.[1] Aon Corporation is an insurance brokerage company with its principal place of business in Chicago, Illinois. It operates its insurance brokerage primarily through its Illinois-based subsidiaries, defendants-respondents Aon Group, Inc. and Aon Services Group, Inc., and their operating subsidiaries.

The complaint alleges that Aon places insurance for its customers without disclosing that Aon receives hidden profits, including profit sharing or so-called

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[1] Unless otherwise noted, Aon Corporation and the other Aon-related defendants are collectively referred to herein as "Aon" or the "Aon defendants."

"contingency fees" from the insurance carrier with whom it places its customers' insurance coverage. Aon Corporation and its chief executive officer, both situated in Illinois, were directly involved in this business, including the management of the business practice challenged in this litigation--Aon's profit sharing policies--as evidenced by Aon's chief executive officer's public statements concerning Aon's practices. R. 1239, 3982; R. 13805-09 (Complaint ¶¶ 5, 14-17).[2]

2. Shortly after the commencement of the action, defendants moved to dismiss pursuant to 735 ILL. COMP. STAT. 5/2-619, asserting that Aon Corporation, Aon Group, Inc., and Aon Services Group, Inc., cannot be held liable for conduct by their subsidiary, Affinity Insurance Services, Inc. Plaintiffs argued that the wrongdoing was conducted by a unified organization headed by Aon Corporation. The circuit court agreed, denying defendants' motion.

In June 2000, defendants moved for summary judgment or, alternatively, for the setting of a bifurcated proceeding. Defendants argued that there was no fiduciary relationship between plaintiff and defendants. On January 28, 2001, the circuit court denied defendants' motion for summary judgment.

On February 13, 2001, plaintiff amended the

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[2] All references to the complaint are to the Corrected Third Amended Complaint ("Complaint").

complaint to, *inter alia*, add Williamson County Agricultural Association ("WCAA") as a plaintiff and K&K Insurance Group, Inc. and K&K Insurance Specialties, Inc. as defendants. Plaintiffs also moved for class certification at that time, asking the court to certify a nationwide class.

3. The substantive claims asserted in the complaint were not based upon individual damages incurred by individual class members throughout the United States, but upon monies collected by Aon subsidiaries and returned to Illinois. Plaintiffs obtained the certification of a nationwide class on July 28, 2004, alleging that contingent commissions received by Aon in Illinois were subject to a constructive trust. App. 99a–100a, 115a. The very nature of the scheme alleged dictated this approach, as the improperly collected profit sharing monies were collected at the corporate level, not from the individual class members. Accordingly, the circuit court concluded that nationwide class certification was proper given, *inter alia*, plaintiffs' assertion of a constructive trust theory of recovery. *Id.* For this reason, it was unnecessary to determine the out-of-pocket damages suffered by each class member. App. 110a. In contrast, the broad approach that had been urged by petitioners would have "necessitate[d] determining, in part, what insurance policies were available to the Aon agent at the time of procurement, the cost of those policies, and the terms of the policies." *Id.*

4. In three separate opinions dated November 4, 2003, July 28, 2004, and November 1, 2004, the circuit court held that Illinois law could properly be applied to all class members because of the numerous and essential contacts with Illinois. App. 119a-126a, 97a-118a, 87a-97a. The circuit court found that Illinois had an intimate involvement with the class' claims, including, the collection of Aon's monies in Illinois.

a. In the circuit court's November 4, 2003 decision, Judge Nowicki examined plaintiffs' and defendants' conflict of law analyses, and adopted plaintiffs' argument that:

> under the most significant relationship approach of the RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145, Illinois Law applies to both Plaintiffs' claims, *because the injury (retention of kickbacks) occurred in Illinois and because the conduct causing injury occurred in Illinois.* In support of this contention, the Plaintiffs point out that they have alleged that the scheme was originated, planned, orchestrated and continues to be supervised by the Aon Defendants in and from Illinois.

App. 122a (emphasis added). Thus, in its November 4, 2003 order, the circuit court correctly found that Illinois law applied, based upon application of the

"torts analysis under the RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145" to which the parties had agreed. *Id.*

Given the parties' agreement as to the applicable law, the circuit court applied the "most significant relationship approach" (App. 122a), finding that the most important factor in this approach was the place of injury – Illinois. "This court adopts the Plaintiffs' position that its allegations that the scheme of receiving or being eligible to receive commissions/kickbacks was originated, planned, orchestrated and continues to be supervised by the Aon defendants in and from Illinois, and its further allegation that *the commissions or undisclosed kickbacks where [sic] received in Illinois*, . . . are sufficient to substantiate the finding that the 'place of injury' is Illinois". App. 124a (emphasis added).

b. In two later decisions dated July 28, 2004 and November 1, 2004, the circuit court again adopted this analysis, rejecting the argument that a state-by-state analysis was required and applying Illinois law to all class members:

[T]his Court further notes that the plaintiffs' complaint articulates a particular theory of recovery that constitutes another valid and reasonable analysis by which the alleged wrongs sustained may be redressed. The plaintiffs have asserted that Illinois may serve to adequately and properly dispose of these issues, as pled, on a nationwide scale, and have cited to Illinois law to support this proposition. [Numerous citations omitted].

Additionally, as noted above, the plaintiffs have been very selective in their choice of theory of recovery. Their lawsuit employs an uncommon perspective, as it does not incorporate as its foundation the out-of-pocket damages sustained by each individual class member. Rather, the plaintiffs have chosen a constructive trust theory to form their measure of damages, and assert that the plaintiffs' damages are properly measured by the disgorgement of profits retained by the Aon entities. As stated prior, the plaintiffs assert that the scheme emanated from Illinois and the fruits of the scheme were realized in Illinois. The plaintiffs argue, and this Court cannot disagree, that the manner in which the complaint is pled in

> conjunction with the unique theory of recovery makes the choice of Illinois as the forum for resolution of this action all the more appropriate.

App. 99a - 100a (July 28, 2004 Opinion).

The circuit court again summarized its analysis in its November 1, 2004 opinion:

> The defendants have argued that the place of injury is where the individual plaintiffs suffered his/her/its loss. *See Ingersoll v. Klein*, 46 Ill. 2d 42, 45, 262 N.E.2d 593 (1970). The Court agrees that the law normally places great weight on that factor. However, as stated previously, this case is not claiming damages to the plaintiffs in the ordinary sense, but rather claims the plaintiffs are entitled to his/her/its fair share of the disgorgement of undisclosed commissions. These commissions, plaintiffs assert, are in the control of the defendants located in Illinois. Since Illinois law properly applies, this Court need not engage in individual conflicts of law analysis for the 50 states. *See Martin*, 117 Ill. 2d 67.
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> Plaintiffs have also alleged that the scheme of receiving or being eligible to

> receive commissions/kickbacks was originated, planned, orchestrated and continues to be supervised by the Aon defendants in and from Illinois and the undisclosed commissions or kickbacks were received in Illinois. To further support this claim, plaintiffs have pointed out to this Court that the decision to terminate this practice of receiving commissions/kickbacks was unilaterally made in Illinois without first consulting any of its alleged independent entities.

App. 91a - 92a, 94a - 95a.

5. This action does not involve a forum that has little or no relationship to the transaction, but one that was centrally involved in both the creation of the practice complained of and the receipt of the proceeds that the illegal conduct had generated.

a. As pled, the Aon defendants are headquartered in Illinois and they operate their nationwide insurance brokerage business under the law of the State of Illinois. The Aon defendants arranged and/or directed from their headquarters in Chicago, Illinois the practices whereby they or their subsidiaries received, directly or indirectly, undisclosed profit-sharing or bonus commissions for placing insurance with insurers. These profit-sharing or bonus commissions were transferred or paid by the Aon defendants' subsidiaries to the Aon defendants. Even

if the secret commissions had been received outside Illinois, they landed in and were controlled by Illinois. The Aon defendants developed and controlled these transactions. Thus, the wrongdoing alleged concerned ongoing transactions that were taking place in the state of Illinois, and Aon continued to maintain control over these transactions in Illinois.

The lower court also found that the ability of Aon Corporation to terminate all profit sharing agreements between its affiliates and insurance companies shows their control over profit sharing arrangements of all the Aon entities. App. 95a.

b. The Aon defendants' document production during the litigation supports this judicial conclusion. First, many of the profit sharing agreements produced are between insurance companies and either Aon Risk Services in Illinois or Aon Corporation in Illinois. Existence of these agreements with the parent entities in Illinois shows that the profit sharing agreements were coordinated, supervised and arranged by the class defendants in this action who are situated in Illinois. Aon produced documents, copies of which are part of the record below (Plaintiffs' Response to Motion to Certify, Jan. 7, 2005, Exs. C and D) showing that communications regarding profit sharing with insureds by Aon agents and employees anywhere in the United States were literally drafted and coordinated by two senior officers of Aon Risk Services in Chicago, again demonstrating control of these entities and profit sharing

relationships by the defendants in Illinois. *Id.* at Ex. D (brief submitted by Aon defendants in a litigation in California, pp. 9-10, asserting that rights of parties relating to practices at issue here are best adjudicated in Illinois and enumerating contacts in Illinois).

c. These facts fully support the circuit court's determination certifying a nationwide class under Illinois law. The circuit court considered the issue of whether Illinois law or the law of each state would apply to plaintiffs' claims three times, and each time concluded that Illinois law would apply. In its opinion, described and discussed more fully below (pp. 20-24, *infra*), the Illinois appellate court examined the certification ruling *de novo* (App. 18a) and fully agreed with the circuit court's analysis. Similarly, the Illinois Appellate Court rejected petitioners' argument that even if Illinois choice-of-law could apply, it should not apply, an issue of no independent constitutional significance. App. 24a.

B. The Settlement

1. After almost six years of litigation, in March 2005, plaintiffs entered into a memorandum of understanding settling this action. The total value of the cash component of the Settlement of this class action is $87 million.[3] In addition to the $38 million

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[3] Separately, the parties to the Attorneys General action, including the Illinois Attorney General, negotiated a settlement of that action ("AG Settlement") with Aon at the same

cash payment provided for by the *Daniel* settlement agreement, class counsel also bargained for the right to obtain the spillover or unclaimed funds from the AG Settlement totaling approximately $49 million as additional consideration to be paid to the Class. But for this provision in the Daniel settlement agreement, Aon could have used those funds "to satisfy any pending or other claims asserted by policyholders relating to these matters," pursuant to the AG Settlement. App. 72a. The Settlement also provided for injunctive relief.

2. a. On March 9, 2005, the circuit court issued an order preliminarily approving the settlement and ordering the notice be given to the class. R. 2276-82. In that order, the circuit court "expressly recognize[d] that the Attorney General Settlement was a result of the active litigation in this case by class counsel." R. 2278. Fifty objections, representing a minute fraction of class members, were filed. Most were withdrawn prior to the fairness hearing conducted by the circuit court, R. 14097, at which only nine objections on behalf of approximately 18 objectors were presented. R. 15687. Of those objectors, several were litigants in an MDL action or in other litigation against Aon and thus were motivated by their own self-interest. R. 14084, 15688, 15697.

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time as the plaintiffs and Aon were negotiating a settlement of this action. R. 5571, ¶ 4; R. 4886. The Attorneys General's lawsuits came a full five-and-a-half years after the commencement of this action.

b. The circuit court reviewed an extensive amount of material in approving the settlement. Prior to the fairness hearings, the circuit court conducted numerous conferences with the parties and objectors, including petitioners herein, regarding the settlement and permitted objectors to obtain a large volume of discovery to allow them to evaluate the settlement. On December 6 and 7, 2005, the circuit court held full days of evidentiary hearings on the settlement. Counsel for the parties, as well as counsel for objectors, were given a right to be heard for and against the settlement. After additional briefing, including submissions of proposed findings of fact and law (R. 15664-15707), and additional discovery provided to objectors, on March 7, 2006, the circuit court held a third hearing with respect to objections and discovery. R. 90-138 (Vol. 79).

3. On April 18, 2006, the circuit court issued a 24-page corrected memorandum opinion and order. App. 58a-86a. That opinion discussed in great detail the background of the litigation, plaintiffs' complaint and the various defenses that Aon had asserted and would assert if the litigation continued. The circuit court then addressed each of the appropriate factors for evaluating class action settlements, finding that the settlement was fair and reasonable. The circuit court's opinion also addressed the objections in nine pages. App. 69a-80a (R. 16557-16565).

4. a. Petitioners suggest that plaintiffs rode the coattails of the Attorneys General investigations.

The simple chronology of this action proves that false. As was found by the circuit court in approving the settlement, for six years plaintiffs and their counsel litigated this immensely complex class action litigation on behalf of purchasers of insurance who had employed Aon as a broker. App. 61a. After this action had been litigated in the circuit court for over five years without the benefit of any governmental investigation, New York's Attorney General, as well as other Attorneys General, announced in October 2004 that they had investigated and were suing Aon and other major insurance brokers based upon substantially the same misconduct asserted by plaintiffs - *e.g.*, undisclosed contingent commissions paid to Aon as insurance broker.

Were it not for the *Daniel* settlement, most of the class members who purchased insurance products through Aon would have had no avenue of redress because the applicable statute of limitations would have barred their claims. Plaintiffs succeeded in obtaining a substantial recovery for the class based upon a novel theory of disgorgement based upon a constructive trust. App. 59a-61a. Moreover, as the circuit court concluded, this litigation itself was "instrumental in reversing a longstanding custom in the insurance brokerage industry" that plaintiffs alleged was improper. App. 60a.

b. Contrary to the contention of petitioners (Pet. 9, 17 n. 1, 31), the certified class was not a settlement class. The circuit court expressly

found that the scope of the certified class was the same as the class in the settlement. App. 71a, R. 15224. Even if the class here had been certified as a settlement class only, the Court need not inquire as to any supposed manageability problem as these petitioners contend. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("in a "settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems....").

REASONS FOR DENYING THE PETITION

This petition seeks review of an Illinois appellate court's judgment upholding a trial court order approving a nationwide opt out class action settlement. The petition discloses no basis – none – calling for this Court's intervention: No "important question of federal law" was announced or decided by the court below. Sup. Ct. Rule 10(c). Rather, the Illinois decision presents only a fact-specific instance of a state court applying uncontested law to a particular set of facts and circumstances.

1. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806-14 (1985), indisputably establishes that state courts can entertain nationwide class actions, so long as certain procedural safeguards are in place, including the right of class members to opt-out. Moreover, CAFA (The Class Action Fairness Act of 2005 (codified at 28 U.S.C. §1332(d) and various other sections of the United States Code)), which petitioners briefly mention (Pet. 28), is among the congressional acknowledgments that state court class actions are constitutionally permissible, albeit subject to ultimate congressional control.

2. a. The Illinois Appellate Court, which reviewed the circuit court's certification order *de novo* (App.18a), determined that Illinois had sufficient contacts with the claims of all the class members to justify application of Illinois substantive law to their claims. Again, the *only* constitutional question,

therefore, is whether Illinois substantive law *could* be constitutionally applied to the claims of all class members who did not opt out. Under this Court's precedents, this is clearly constitutionally permissible when the state has a "'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests' in order to ensure that choice of [a state's] law is not arbitrary or unfair." *Shutts*, *supra* 472 U.S. at 821-22, *quoting Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981). That Illinois had sufficient contacts with the class claims does not, of course, mean that the law of some other state or states could not also be constitutionally applied to some or all of the same claims. Multi-state cases "may justify, in constitutional terms, application of the law of more than one jurisdiction." *Allstate*, *supra*, 449 U.S. at 307; *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 495-96 (2003).

b. As this litigation illustrates perfectly, the typical choice-of-law question is not whether a state court *could* constitutionally apply its own substantive law, but whether it *should*. It is well recognized that more than one rule of law properly may be applied (*see*, Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. Rev. 719, 721-34 (2009)), but, regardless, the "should" question presents *no* federal question. *Allstate*, *supra*, 449 U.S. at 307 ("It is not for this Court to say...whether we would make the same choice-of-law decision if we were sitting as the [state supreme

court]."). Again, the *only* constitutional question, therefore, is whether Illinois substantive law *could* be constitutionally applied to the claims of all class members who did not opt out.

3. The Illinois Appellate Court fully understood what *Shutts* required. The Appellate Court said: "For choice of law questions, Illinois adopts the most significant contact test articulated in the Restatement (Second) of Conflict of Laws (1971)." (App. 18a). That standard, a multi-factored one, is plainly constitutional, and the court below correctly applied it here. Even if, however, this or any other court would have applied the Restatement (Second) differently, that would provide no grist for this Court's mill. *Allstate*, *supra*, 449 U.S. at 307; Sup. Ct. R. 10; E. Gressman, et. al., SUPREME COURT PRACTICE § 4.14 (9th ed. 2007).

4. a. We are at a loss to understand what the petition believes to be the constitutional deprivation of "liberty" or "property" allegedly sanctioned by the Illinois Appellate Court in approving this opt out settlement. That court reviewed the certification order *de novo*, looked explicitly at the relationship between Illinois and the claims of all class members, and decided that Illinois law both could and should be applied. See pp. 20-24, *infra*. The petition asserts, however, that due process "require[s] an individualized choice of law analysis for each class member's claim *before* a single state's law may be applied to a nationwide class action." (Pet. i, Questions Presented)

(emphasis added).[4] But Illinois' contacts with the parties' claims are either constitutionally sufficient or they are not, and resolution of that issue does not depend on whether those contacts are looked at *ex ante* or *ex post* a multi-state survey.

b. The claim that application of Illinois law is unfair to petitioners passes our understanding. Petitioners say (Pet. 29) that, if Tennessee substantive law applied, petitioner HCA could have received a great deal more money. If so, petitioner should have opted out.[5] That option was accorded to it, as *Shutts* required.

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[4] Petitioners occasionally make reference to the Full Faith and Credit Clause. But, despite Sup. Ct. R. 14(1)(g)(i), the petition nowhere specifies where such an issue was raised in the state courts. Compare Sup. Ct. R. 14(1)(g)(i) with Pet. at 33. Since that claim was not "specially set up or claimed," 28 U.S.C. § 1257, no full Faith and Credit issue is open here. *E.g. Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969); *Webb v. Webb*, 451 U.S. 493, 499-501 (1981). We pursue the matter no further because the Full Faith and Credit argument adds nothing to the Due Process Clause in this area. *Allstate*, *supra*, 449 U.S. at 308, n.10 (plurality opinion); *id* at 332 (Powell, J., dissenting); *Shutts*, 472 U.S. at 818-19.

[5] In fact, the class includes numerous corporate entities. Moreover, a number of major corporate entities, which had opted out of the class, opted back *in* to the class settlement, including, for example, American Airlines, Inc., Pacific Gas & Electric Company, Time Warner, John Deere & Company, and the Tribune Company. R. 14022-23, 14073.

ARGUMENT

This Petition Presents No Important Issue Of Federal Law

A. The Illinois Proceedings

1. While we have set out the facts in some detail, *supra*, the ones of material concern to this Court are far more succinctly stated. This litigation is no more than a fact-specific, run of the mill state court opt-out class action. The Illinois circuit court complaint charged defendants, Aon Corporation, and its affiliates, the world's second largest insurance and largest reinsurance broker, with wrongdoing in obtaining commissions and other kickbacks from insurance companies to whom it steered business all in disregard of their duties to policy holders. The wrongful conduct was conceived of, originated, and supervised at Aon's Illinois headquarters, and the fraudulent payments were received there. App. 95a, 100a, 122a. Defendants vigorously opposed certification of a nationwide opt out class, asserting a wide array of objections, *inter alia*, the necessity for state-by-state analysis of choice of law. In granting certification, the circuit court entered three carefully reasoned opinions dealing with the certification of such a class. App. 58a-126a. After defendants settled, various objectors (all of whom could have opted out) continued to press appeals. On July 9, 2008, the Appellate Court of Illinois, First District, in an expansive opinion, upheld the class certification and

settlement. App. 3a-52a. On March 25, 2009, the Illinois Supreme Court declined leave to appeal. App.1a.

2. The Illinois courts rejected a wide array of challenges, relating to the adequacy of notice, lack of discovery, admissibility of evidence, fairness of the settlement, and the size of the award of attorneys' fees. It is not suggested that any of these rulings is for this Court's inspection.

B. The Illinois Certification Ruling

1. The Appellate Court, whose judgment is under review here, set out the objectors' class certification claims in Part III of its opinion, stating "we will consider any potential due process concerns raised in this case." App.17a. Part IV, entitled Choice of Law, sets forth the court's reasoning. The Appellate Court began with a careful separation of the "could" from the "should" issue:

> The objectors argue that Illinois law cannot apply to a nationwide class of policyholders. The argument is two-fold. *First,* we must determine whether Illinois law *can* apply to a nationwide class of insureds that obtained insurance through Aon. Critical to the first question is whether or not Illinois choice of law rules permits Illinois law to apply to a nationwide class of policyholders. The

> second closely related question is whether Illinois law *should* apply. In answering the second question, we must determine whether the trial court is required to canvass the laws of all fifty states prior to certifying a nationwide class under Illinois law. App. 17a-18a (emphasis added).

2. The Appellate Court then turned to the Illinois choice-of-law law issue, which it reviewed *de novo*: "[a]ppellate review of a trial court's choice-of-law decision is reviewed *de novo*." App. 18a. The Appellate Court said:

> For choice of law questions, Illinois adopts the most significant contact test articulated in the Restatement (Second) of Conflict of Laws (1971). *Esser v. McIntyre*, 169 Ill. 2d 292, 298 (1996). The most significant relationship test requires a court to consider "(1) where the injury occurred; (2) where the injury-causing conduct occurred; (3) the domicile of the parties; and (4) where the relationship of the parties is centered." *Esser*, 169 Ill. 2d at 298 (*citing Ingersoll v. Klein*, 46 Ill. 2d 42, 47 (1970)). *Id.*

3. After stating Illinois' general approach, the Appellate Court turned to the question of whether Illinois law *could* be applied in this litigation.

Contrary to petitioners' frequent assertions (see Pet. 9,10,14, 16,18, and 23), the Appellate Court - which, we emphasize, examined the certification issue *de novo* and whose judgment alone is the subject of this Court's review - examined the relationship of the claims of all the class members to Illinois, not just the claims of the class representatives:

> Objectors first complain that the trial court did not perform a state-by-state analysis to determine what law applied to the members of the class. Instead, the trial court applied Illinois law to all members of the class-members that are present in all 50 states.
>
> In three separate opinions, the trial court applied the most significant relationship approach to the claims of the Daniel Class and each time determined that Illinois substantive law should apply. The trial court justified application of Illinois law to a national class for two reasons. First, Aon's center of business was located in Illinois, the wrongful scheme alleged was "originated, planned, orchestrated and continues to be supervised by the Aon Defendants in and from Illinois."
>
> Second, the Daniel Class's theory of recovery justified the application of

> Illinois Law. At the certification stage of the case, the Daniel Class argued for class certification based upon the somewhat novel and untested theory of a "constructive trust." Under the constructive trust theory, the Daniel Class argued that each member was entitled to a pro rata share of the ill-gotten profits obtained by Aon by way of their contingent commissions. This avoided the problem of determining the out of pocket expenses of each individual plaintiff. The trial court noted that, because the case was, in effect, the Daniel Class's claim to "his/her/its fair share of the disgorgement of undisclosed commissions," the commissions are in control of Aon, and located in Illinois. Because commissions were under the control of an Illinois defendant, Illinois law applied.

App. 19a.

4. The Appellate Court then concluded:

> The trial court properly applied the "most significant-relationship test." The unique nature of the theory of recovery alleged in this case downplays the significance of the "location of the injury" factor articulated in Illinois choice-of-law

> jurisprudence. Further, the Daniel Class brought its claim against Aon based upon Aon's retention of ill-gotten funds. The injury is the result of the contractual relationship entered into by insurance purchasers, insurance brokers, and insurers.
>
> The injury causing conduct most likely occurred in Illinois. While many class members entered into contracts in states other than Illinois, the fraudulent conduct was, as the trial court found, primarily devised and undertaken at Aon's principle [sic] headquarters in Illinois.

App. 20a. After distinguishing two cited decisions, one an Illinois case, the other a decision of the Seventh Circuit (App. 20a – 22a), the Appellate Court then went on to satisfy itself that, as a choice-of-law matter, Illinois should be applied. App. 21a – 24a.

C. Petitioners' Constitutional Challenge

1. Despite the petition's frequent citations to such cases, this petition is not about Fed. R. Civ. P. 23, or the limitations it imposes on federal court class certification. The sole issue here is the limits imposed by the Constitution on certification of state court nationwide opt out classes. More narrowly still, the

issue is the extent to which the Constitution limits application of the state's own law to the claims of the class members. As we have said, due process prohibits application of the Illinois substantive law *only* if Illinois lacks a "significant contact or aggregation of contacts" with the underlying transaction, *Shutts*, *supra*, 472 U.S. at 821-22, quoting *Allstate*, *supra* 472 U.S. at 312-13, a narrow limitation rarely transgressed. *Allstate*, *supra*, 472 U.S. at 312-13 n.17.

2. The misconduct perpetrated upon all the class members was conceived of, planned, orchestrated, and supervised in Illinois, and the payments generated by that misconduct were received in Illinois.[6] These contacts – all of which are pre-litigation contacts with Illinois – are constitutionally sufficient to justify application of Illinois substantive law to the claims in dispute. This is especially apparent, as any dissatisfied petitioners could have availed themselves of what they believed to be a more favorable substantive law simply by opting out of the class action.

3. Instead of opting out, however, petitioners ask this Court to fashion some new due process choice-of-law rule, the dimensions of which petitioners nowhere near suggest. Deeply embedded doctrine now holds that, so long as the state has sufficient contacts

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[6] *See supra* at 3, 22-23 (contingent commissions received in Illinois were subject to a constructive trust).

with the underlying claims, it *can* constitutionally apply its own substantive law. It need not do so, of course. That is the "should" issue. And as *conflict of laws* casebooks make plain, there are numerous "modern" approaches to the "should" question. Illinois, follows the Restatement of Conflicts (Second); it applies the law of the state with the most significant contacts. Any divergence in approach to the "should" questions is but an inherent aspect of Our Federalism, *Younger v. Harris*, 401 U.S. 37, 41 (1971).

4. If petitioners are suggesting that the Due Process Clause requires the Illinois courts (and subject to review, this Court) to "balance" Illinois "interests" against the "interests" of other states before Illinois can constitutionally apply its own substantive law, any such argument has been foreclosed for decades.[7]

5. In light of this settled doctrine, it is wholly unclear what petitioners complain of. Either the Illinois contacts are constitutionally sufficient or they are not. Engaging in a multi-state survey may be a permissible choice of law approach, but it has nothing to do with the constitutional sufficiency of a state's contacts.

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[7] *Allstate, supra*, upheld the application of state law without inquiring whether another state had a greater interest. *See also, Franchise Tax Board v. Hyatt*, supra, 538 U.S. at 495-96, explicitly noting that "we abandoned the balancing-of-interest approach to conflict of law..."; *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493, 502-05 (1939).

D. Petitioners' Additional Claims

The final pages (Pet. 26-34) of the petition are revealing, but they require little comment. Quite clearly, petitioners do not like state court class actions. Essentially, their argument runs as follows: 1) nationwide state court class actions are bad; 2) nationwide state court class actions in Illinois are very bad; 3) nationwide state court class actions in Madison County are very, very bad[8]; and 4) this case presents the first clear opportunity for the Court to rule on these actions.

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[8] For the record, the class action in this case originated in Cook, not Madison, County, Illinois. App. 119a.

The first three arguments should be addressed to Congress, not to this Court. They say nothing whatsoever relevant to why this petition presents an important question of federal law calling for this Court's intervention. As to the final argument, petitioners note that "questions similar to [p]etitioners' have been raised numerous times in the past." Pet. 31. Perhaps, the reason they have not been taken is because they are so insubstantial, and, far from being a clear opportunity, this case possesses the singular feature of a constructive trust respecting an Illinois based res.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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